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212580

November 19, 2004

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board – Case Control Unit
1925 K Street, N.W.
Washington, D.C. 20432

ENTERED
Office of Proceedings

NOV 19 2004

Part of
Public Record

Re: Docket No. 42069, Duke Energy Corporation
v. Norfolk Southern Railway Company

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten copies of the Response of Complainant Duke Energy Corporation to the Board's October 20, 2004 Order.

Kindly acknowledge receipt and filing of these materials by date-stamping the extra copy of this letter and returning it to our messenger.

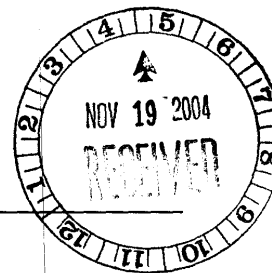
Sincerely,

C. Michael Loftus

Enclosures

cc: G. Paul Moates, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD



DUKE ENERGY CORPORATION,

Complainant,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY,

Defendant.

212580

Docket No. 42069

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Office of Proceedings

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RESPONSE OF COMPLAINANT DUKE ENERGY
CORPORATION TO THE BOARD'S OCTOBER 20, 2004 ORDER

DUKE ENERGY CORPORATION

By: Paul R. Kinny
Assistant General Counsel
Duke Energy Corporation
Mail Code PB05E
422 South Church Street
Charlotte, NC 28202-1904

OF COUNSEL:

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(202) 347-7170

Date Due: November 19, 2004

Attorneys for Complainant

| | | |
|--------------------------|---|------------------|
| DUKE ENERGY CORPORATION, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Docket No. 42069 |
| |) | |
| NORFOLK SOUTHERN RAILWAY |) | |
| COMPANY, |) | |
| |) | |
| Defendant. |) | |
| |) | |

As directed by the Surface Transportation Board (“STB” or “Board”), Complainant Duke Energy Corporation (“Duke”) hereby responds to the order that the Board served in the above-captioned proceeding on October 20, 2004 (the “October 20 Decision”).

Counsel for Duke has conferred with counsel for Norfolk Southern Railway Company ("Norfolk Southern") in an effort to work out an agreement regarding

the procedure and schedule for the phasing case. Counsel for both parties reached essential agreement in regard to the timeline but were unable to agree regarding a procedure for the submission of evidence. Duke believes that as the party with the burden of proof in this proceeding, it should have the right to open and close the evidentiary record. See e.g., Bituminous Coal – Hiawatha, Utah to Moapa, Nevada Aggregate Volume Rate on Coal – Acco, Utah to Moapa, Nevada, 1987 WL 98994 at *1 (slip opinion); Finance Docket No. 34424, Canadian Nat'l Rwy. Co. and Grand Trunk Corp. – Control – Duluth, Missabe and Iron Range Rwy. Co. and the Pittsburgh & Conneaut Dock Co., STB Served April 9, 2004, at 13. The procedure followed in the earlier phase of this case followed this pattern, as has the procedure followed in other coal rate cases. Duke therefore requests the Board to adopt the procedure proposed by Duke, which involves an Opening Statement of Fact and Argument presented by the complainant, a Reply Statement of Fact and Argument presented by respondent, a Rebuttal Statement of Fact and Argument presented by complainant, and Briefs presented by both parties. The schedule and procedure are presented in Exhibit 1. Duke understands that Norfolk Southern will be filing a reply to this Response advising the Board of its proposed procedure.

Accordingly, Duke confirms that it wishes to submit evidence and argument on the need for relief under the phasing constraint in this proceeding in light of

the October 20 Decision, and requests that the Board establish the procedure and schedule set forth in Exhibit 1.

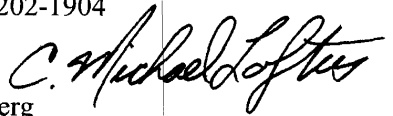
Respectfully submitted,

DUKE ENERGY CORPORATION

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Attorneys for Complainant

Exhibit 1

| | |
|---------------------|--|
| D ¹ + 20 | Discovery served. |
| D + 50 | Responses and objections to discovery requests due. |
| D + 55 | STB Discovery Conference. ² |
| D + 85 | Completion of Production. |
| D + 115 | Duke submits Opening Statement of Fact and Argument. |
| D + 145 | Norfolk Southern submits Reply Statement of Fact and Argument. |
| D + 175 | Duke submits Rebuttal Statement of Fact and Argument. |
| D + 205 | Parties file Briefs. |

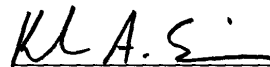
¹ "D" represents the service date of the decision in which the Board adopts a procedural schedule for this case. The Parties will confer after the STB issues the decision establishing "D" and will agree on dates certain for all events, avoiding weekends and holidays.

² If significant discovery issues are not resolved, a delay in the proposed schedule may be necessary to accommodate motions to compel and additional discovery conferences. The parties have agreed, however, to try to avoid such conflicts.

Certificate of Service

I hereby certify that this 19th day of November, 2004, I have caused copies of the foregoing Response to be served by hand on counsel for Defendant Norfolk Southern Railway Company as follows:

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G. Paul Moates, Esq.
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